Nos. 14-556, 14-562, 14-571 and 14-574

IN THE

# Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENT

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## AMICUS BRIEF OF THE CLEVELAND CHORAL ARTS ASSOCIATION INC A/K/A THE NORTH COAST MEN'S CHORUS IN SUPPORT OF PETITIONERS


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## Questions Presented

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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## Interest of Amicus Curiae[1]

Amicus, the North Coast Men's Chorus ("the Chorus") is a performing arts organization of gay men dedicated to touching the hearts and changing the lives of its members and audiences. The Chorus provides a safe and supportive environment for its members and utilizes music to alter negative public attitudes towards the Lesbian/Gay/Bisexual /Transgender ("LGBT") community.

Founded in 1987 by a handful of courageous gay men, at a time when many chose to hide their sexual orientation, the Chorus now has over 100 active members. Chorus members rehearse in LGBT friendly churches and perform three formal concerts per season. In June, 2014 the official "Pride" month for the LGBT community, the Chorus presented "My Big Fat Gay Wedding," anticipating the day when marriage equality becomes reality.[2]

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[1] Written consent has been granted by counsel for all Petitioners; the Respondents have all filed blanket consent letters. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation. The Cleveland Choral Arts Association, Inc., an Ohio nonprofit corporation known as the "North Coast Men's Chorus," is a member of the Gay and Lesbian Association of Choruses, an association of 170 similar choruses.

[2] In August, 2014, the Chorus performed concerts at Playhouse Square, Cleveland during the international Gay Games 9, one of the world's largest sports & cultural festivals.

The Chorus is diverse as to its members' race, ethnicity, religion, and age. Many Chorus members are active in their churches: some are ordained and lay ministers of churches that embrace diversity and recognize the dignity of all of our relationships, including those of same-sex couples.

Some Chorus members have had prior heterosexual marriages. They have children and grandchildren. Their same-sex relationships came later in life. Some have married their same-sex partner out of state while others yearn to marry within Ohio in front of their own community. Ohio's treatment of same-sex spouses as legal strangers has a direct impact on the lives of Chorus members.[3]

## Introduction and Statement

In examining the legislative history surrounding Ohio's enactment of its same-sex marriage bans, one finds a record replete with bias against, and negative attitudes towards same-sex couples. Direct evidence of anti-gay bias comes from the Official Argument or Explanation ("Explanation") for an Ohio constitutional amendment. The Ohio electorate relies upon the Ballot Initiative's Explanation (the pros and cons) for an informed vote. Since 2003, designated Committees of Proponents and Opponents may prepare the Explanation.[4] The five

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[3] See pages 30-32 for their stories.

[4] Professor Susan Becker recognized that ballot initiatives "have become a favorite tool of special interest groups seeking to disenfranchise minorities" and are abused because "special interest group constitutional amendments are often ambiguous

member Ohio Ballot Board, Chaired by Ohio's Secretary of State, writes the Explanation if a Committee fails to do so properly; the Board ensures it stays under 300 words per side. The Ballot Board must publish the Explanation in newspapers of every Ohio County for three consecutive weeks prior to an election.[5] Ohio's 2004 Issue 1 [Ohio Const. art. XV, §11] read:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

The "Argument and Explanation in Support of the Marriage Protection Amendment (Issue 1)" stated: [6]

> Vote YES on Issue 1 to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one

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and designed to exploit the majority's ignorance about and fear of minorities." *Henry* 14-CV-129 ECF 17-3 Pg ID161.

[5] Am.Sub.H.B. 445 (2002) added Ohio Rev. Code § 3505.062(D) and §3519.03 (effective 2003); Ohio Const. art. II, §§ 1a, 1g; art. XVI, § 1; Ohio Rev. Code §3505.06, §3505.062(C)-(E), (G); and §3519.03 govern the Explanation.

[6] Ohio Issues Report, distributed by the Ohio Ballot Board. *Henry* 14-CV-129 ECF 17-3 Pg ID167, 319 (J.A. 170).

woman, and to protect marriage against those who would alter and undermine it.

## WHAT ISSUE 1 DOES:

Issue 1 establishes in the Ohio Constitution the historic definition of marriage as exclusively between one man and one woman as husband and wife.

Issue 1 excludes from the definition of marriage homosexual relationships and relationships of three or more persons.

Issue 1 prohibits judges in Ohio from anti-democratic efforts to redefine marriage, such as was done by a bare majority of the judges of the Massachusetts Supreme Court, which ordered that same-sex "marriage" be recognized in that state.

Issue 1 restricts governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other **deviant** relationships that seek to imitate marriage.

## WHAT ISSUE 1 DOES NOT DO:

Issue 1 does not interfere in any way with the individual choices of citizens as to the private relationships they desire to enter and maintain.

> Issue 1 does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.
>
> The wisdom of the ages tells us that marriage between one man and one woman is critical to the well being of our children and to the maintenance of the fundamental social institution of the family.
>
> Please vote to preserve marriage on November 2, 2004.
>
> Please Vote YES on Issue 1, the Marriage Protection Amendment.
>
> Submitted by the Ohio Campaign
> to Protect Marriage:
> Rev. K.Z. Smith
> Lori Viars
> Phil Burress
> J.A. 170 (Emphasis supplied).

Thus, per the Proponents, the express motivation, purpose, and effect of Issue 1 was to deny status, recognition, and benefits to same-sex couples precisely because their relationships are homosexual and deviant. The Canton Repository wrote that the Proponents "make no bones about wanting to make life as difficult as possible for all couples, gay or

straight, who don't toe their moral line."[7] Ohioans voted for Issue 1 -- 3,329,335 (61.37%) to 2,065,462 (38.29%).

The District Court in *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 974-5 (S.D. Ohio 2013) and *Henry v. Himes*, 14 F.Supp. 3d (S.D. Ohio 2014), also found the presence of animus with the Ohio Legislature's adoption of Ohio's Super-DOMA, Sub. H.B. 272, codified as R.C. §3101.01(C)(1)–(3), earlier in 2004. This statute banned recognition of out of state same-sex marriages, making them *void ab initio* in Ohio, and displaced Ohio's long-standing policy respecting the place of celebration rule).[8] The uncodified language of Sub. H.B. 272 §3(b) banned Ohio from recognizing alternatives like Vermont's civil unions. Ohio's Super-DOMA was fast-tracked and passed within weeks. Justifications of various Legislators included religious views, fear of the courts, and bias against LGBT persons. *Id.*, Pg ID 150-51, 160.[9]

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[7] Citizens for Community Values ("CCV"), the principal donor to its PAC, the Ohio Campaign to Protect Marriage (OCPM), gave $1.182 million; the next largest contributor gave $2,000. http://ballotpedia.org/Ohio Issue 1, the Marriage Amendment (2004).

[8] *Henry* 14-CV-129 ECF 17-5 Pg ID 392-93, 399, 406; ECF 17-3 Pg ID 139, 150 (Becker at ¶¶ 2, 35)..

[9] Cf. *Henry* 14-CV-129 ECF 17-3 [Rep. Ron Young: "[W]e're talking about a divine institution that's been given to us by God," "males and females coming together in traditional marriage create the basic unit, the building blocks of our society."); Rep. Sietz: "To prevent the Ohio Supreme Court from rendering a decision similar to the [2003] Massachusetts decision"; with Rep. Ujvagi: "[A]nyone who attended any of the hearings ...knows the level of intolerance that was presented" to support this legislation; Sen. Dann: "And everybody who

## Summary of Argument

The legislative history of Ohio's same-sex marriage bans sustains the district court's findings of unconstitutional animus. Under this Court's precedents, the presence of unconstitutional animus triggers "careful consideration" – a species of rational basis review that differs in its bottom line application. The argument explains the definition of animus; the types of evidence this Court has accepted for animus findings; how evidence in the record below readily meets that standard; and how the State's post-hoc, "any plausible justifications" fail to overcome the presence of animus. The text of Ohio Const. art. XV, §11, the Official Explanation distributed by the Ohio Ballot Board (J.A. 170), and Ohio's Super-DOMA enactment demonstrate the presence of unconstitutional animus. Gays and lesbian relationships alone were singled out as "deviant relationships" and attempting "to imitate marriage." No level of Ohio government (state or local) may recognize any form of same sex marriage or civil union. When this Court has found laws to be primarily be a vehicle for expressing private bias—it has not let the law stand, despite superficial legitimate justifications.

Under the fundamental right to marry, and *Loving*'s corollary right to have another state recognize one's out of state marriage, individuals

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reads this bill and people affected by it are going to suffer from that hate"; Sen. Prentiss "This bill imposes one set of values not held by all."] Pg ID 151,153, 157-158, 202, 214, 248, 253.

have a right to marry, make themselves legal relatives, and create and structure their families. The freedom to marry is inseparable from the freedom to marry the person of one's choice. Marriage is a form of public commitment of spouses to their children, families, and community: it promotes stable families and ultimately, respect. State restrictions of these rights must satisfy some form of heightened scrutiny. Because Ohio still recognizes some common law marriages (those entered into before 1991), and marriage licensing serves merely evidentiary and vital statistical purposes, Ohio's same-sex marriage bans are nothing more than a vehicle to demean and destabilize same sex relationships and families. There is no important, compelling, or even legitimate justification for denying LGBT families legal status, legal documents (accurate birth, marriage, and death certificates).

## Argument

### I. Where the Record Contains Explicit Statements Of Private Bias Against The Targeted Group, This Court Has Found The Presence Of Unconstitutional Animus.

This Court has applied the doctrine of unconstitutional animus in only a small number of cases.[10] Although the precise contours of the

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[10] This summary of unconstitutional animus is distilled from Professor Susannah Pollvogt's comprehensive treatment of the subject in *Unconstitutional Animus*, 81 Fordham L. Rev. 887 (2012).

doctrine have yet to be refined,[11] several clear propositions appear from careful examination of this animus jurisprudence.

### A. The Definition of Animus

First, although a few members of this Court have characterized animus as a "fit of spite" or a form of bigotry,[12] the Court's animus precedent unequivocally establishes that unconstitutional animus may also be understood as mere moral disapproval, private bias, or discomfort with those who are "different" somehow.[13] Thus, a finding of unconstitutional animus does not necessarily mean that a law's proponents were filled with hatred. Rather, the doctrine recognizes that we are all subject to private prejudices, which evolve over time.[14]

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[11] See *Windsor, Animus, and the Future of Marriage Equality*, 113 Columbia L. Rev. Sidebar 204, 205-06 (2013)(explaining doctrinal uncertainty surrounding animus); cf. *Bishop v. Smith*, 760 F.3d 1070, 1096-1109 (10th Cir.)(Holmes, J., concurring)(extensively discussing animus doctrine, citing animus scholars, and citing *Obergefell* and *Henry* as lower court animus cases), *cert. denied*, 135 S.Ct. 271 (2014).

[12] See *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

[13] See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985); *Unconstitutional Animus* at 924-25 (citing cases).

[14] *Cf. United States v. Virginia*, 518 U.S. 515, 566-67 (1996)(Scalia, J., dissenting) ("Close-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.")

The function of the doctrine of animus is to prevent private prejudices from being reflected and enforced through the public laws:

> The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

*Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

### B. Evidence of Animus

This Court's animus precedent shows that the presence of animus can be demonstrated in at least two ways. In an "easy case," the legislative history surrounding the enactment of a particular law contains explicit statements of private bias directed toward the group targeted by the law.[15] While this Court has, in some of these cases, examined the fit between the means and ends (that is, the Court applied the applicable level of judicial scrutiny) and

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[15] See *Windsor*, 133 S.Ct. at 2693 (finding impermissible animus where statements in the Defense of Marriage Act's ("DOMA") legislative history demonstrated that the purpose of the law was to express moral disapproval of homosexuality); *City of Cleburne*, 473 U.S. at 448 (finding impermissible animus where statements in the legislative history expressed stereotypes toward those with cognitive disability); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (finding impermissible animus where statements in the legislative history indicated a purpose of targeting and excluding "hippies" from food stamp benefits); see also *Unconstitutional Animus* at 927 (describing instances where the record presents direct evidence of private bias as the "easy case" for finding animus).

concluded that the law failed on that basis as well,[16] the Court has also struck down state action solely on the basis that the law was explicitly grounded in private bias.[17]

*Palmore – often overlooked as an animus case* - provides crucial guidance on this point. The *Palmore* Court reviewed the constitutionality of a family court order divesting a divorced mother of custody of her young child because the white mother had started a relationship with a black man. The family court judge reasoned that, because society maintained a pervasive bias against interracial relationships, this bias would be visited on the child and custody to the mother would not be in the child's best interest.[18]

In reviewing the order's constitutionality, the Supreme Court concluded that it met strict scrutiny and that protecting the child's best interest was a sufficient important interest.[19] Where avoiding the societal stigma of being raised by an interracial couple, relying upon a racial classification was

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[16] Significantly, in both *Moreno* and *Cleburne*, after finding explicit evidence of animus, the Court looked at whether there was a sufficiently significant relationship between the characteristic defining the targeted group (relatedness/ cognitive disability) and the interest being regulated (food security/ access to group housing) and found no nexus.

[17] In both *Romer* and *Windsor*, the Court did not perform a traditional means-ends analysis examining the relationship between the characteristic defining the targeted group and the interest being regulated.

[18] 466 U.S. 429, 430-31 (1984).

[19] *Id.* at 432-433.

deemed necessary to accomplish this goal. Although the order survived strict scrutiny, it served to enforce private bias, and hence, was struck down as violating equal protection.[20] There was no allegation or evidence of bias or animus on the part of the state actor - the family court judge. Rather (and fatally), the state action reflected and reinforced private bias existing in the community.

In other animus cases, the Court has looked to both direct evidence of animus (explicit statements of bias in the legislative record) and indirect evidence of animus (a lack of fit between the challenged laws purported goals and the classification at issue.) Thus, in *Moreno*, the Court invalidated the challenged law because there was direct evidence of bias in the record (dislike of hippies) and the classification—the lack of relatedness of household members—was not connected to preventing food stamp fraud.[21] Similarly, in *Cleburne*, the Court invalidated the challenged state action on the basis of both direct evidence of animus and the absence of any connection between the trait of cognitive disability and the goal of regulating housing to avoid overcrowding or traffic congestion.[22]

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[20] *Id.* ("There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.")

[21] *Moreno*, 413 U.S. at 537.

[22] *Cleburne*, 473 U.S. at 449-50 (zoning permitted other group housing-apartment buildings and fraternities/ sororities).

*Windsor* arguably falls into the same doctrinal camp as *Palmore* because the presence of animus (state action reflecting private bias) overwhelmed the law's purported justifications. *Windsor* noted the vast, negative impact of the Defense of Marriage Act: the legislative history revealed an acknowledged purpose of expressing moral disapproval of homosexuality.[23] The Court did not, however, examine the fit between the classification and other claimed legislative ends. Rather, the conclusion that DOMA was based in animus discredited any purported justifications for the law and provided an independent basis for striking it down.

In sum, while the Court has in some instances looked at both direct evidence of animus and indirect (or structural) evidence of animus, in other instances the Court has found the unequivocal expression of private bias to be a sufficient basis on which to find an equal protection violation.

### C. The Relationship Between Animus and Rational Basis Review.

This Court's precedents are not clear as to the precise relationship between animus and Fourteenth Amendment rational basis review.[24] At times the Court appears to treat a finding of animus as a

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[23] 133 S.Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.")

[24] See *Windsor, Animus, and the Future of Marriage Equality* at 214-15.

trigger for applying so-called heightened rational basis review (rational basis with bite); at other times the Court treats animus as a silver bullet—once its presence is found, no further inquiry is necessary.[25] Under either approach, the Ohio laws fail.

One thing is clear: When this court has discerned the presence of animus—that is, where a law is found to primarily be a vehicle for expressing private bias—it has never once let the law stand, despite superficial, legitimate justifications.[26]

## II. The Record Here Presents An "Easy Case" For Finding Unconstitutional Animus, And Such A Finding Provides a Sufficient Independent Basis for Striking Down Ohio's Same-Sex Marriage Ban Laws.

Before this Court, there is compelling evidence of the presence of unconstitutional animus.

- Per the Official Explanation, Issue 1's Proponents explicitly sought to deny status, recognition and benefits to same-sex couples precisely because they were in same-sex relationships, that is, homosexual. J.A. 170.

- The Official Explanation explains that "homosexual and other deviant relationships" seek "to imitate marriage." J.A. 170. Merriam-Webster's Dictionary

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[25] See *Unconstitutional Animus* at 889, 930

[26] *Id.* at 930.

defines "deviant" as "different from what is considered to be normal or morally correct." The pejorative quality is reflected in synonyms listed as part of the definition: aberrant, abnormal, irregular and unnatural. *Id.*

- The Explanation expresses concern for the welfare of the children of opposite-sex couples only and excludes from concern an entire class of children—those raised by same-sex couples. This is blatant discrimination against a class of children who have become the "collateral damage" of society's disapproval of same-sex couples.

- Finally, the timing and circumstances surrounding the adoption of the marriage bans expose the presence of animus. Proponents were threatened by the 2003 Massachusetts Supreme Court and Vermont Legislature's decision on same-sex marriage (or civil unions) and hurriedly passed the marriage bans to eliminate any possible similar marriage recognition in Ohio.

Although individuals may harbor prejudices against those they dislike, disapprove of, or find to be deviant,[27] the law may not give those private biases

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[27] *Cf.* the lyrics of Rodgers & Hammerstein's 1949 musical, *South Pacific*, dealing with interracial marriage:

effect. *Windsor*, 133 S.Ct. at 2696; *Romer*, 517 U.S. at 630; *Cleburne*, 473 U.S. at 448.

## III. The Presence of Animus Overwhelms Ohio's Purported Justifications for Ohio's Same-Sex Marriage Bans.

In the Courts below, Ohio argued that Equal Protection case law required Courts to apply the "any plausible reason standard" of rational basis review. Although the *Deboer* panel majority embraced this position – see 772 F.3d 388, 404 (6th Cir. 2014), earlier Sixth Circuit panels recognized that this is not the standard this Court applied in the presence of animus cases.[28] *Obergefell* 962 F.Supp.2d at 992, and *Henry* both found the presence of animus overwhelmed Ohio's justifications:

1. Ohio's Democratic Process Would Set marriage policy of this State. Ohio Resp. to Pet. Cert at 26. No: CCV and its PAC, the OCPM, poisoned the proverbial well. They wrote Issue 1's Proponent's

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Continued. . . .

> You've got to be taught before it's too late,
> Before you are six or seven or eight,
> To hate all the people your relatives hate,
> You've got to be carefully taught!

http://en.wikipedia.org/wiki/You've_Got_to_Be_Carefully_Taught

[28]See *Warren v. City of Athens*, 411 F.3d 697, 710-711 (6th Cir. 2005)(Gibbons, J.)(Plaintiff proceeding under theory that law was motivated by animus or ill will does not have to disprove all conceivable justifications). Additionally, as to marriage, this Court in *Zablocki* and *Turner* used a more rigorous test than the "any plausible basis standard" the *Deboer* majority used.

Explanation; their television and media campaign spent millions on radio/television ads and robocalls featuring Secretary of State Blackwell urging voters to amend Ohio's constitution to deny marriage and any form of relationship recognition to Ohio's same-sex couples; CCV sent letters to school districts falsely stating groups seeking to protect LGBT teens encouraged illicit behavior; and they successfully cattle-prodded the Legislature months earlier to reject Ohio's traditional place of celebration rule as to marriage recognition.[29] *Obergefell*, at 975. The Secretary of State's behavior in Issue 1 did not escape judicial criticism: See *State ex rel. Essig v. Blackwell*, 817 N.E.2d 5, 13 (2004) (Pfeifer, J., dissenting) ("Whether the Secretary of State's overt political interest in the passage of the proposed amendment influenced his decision is unknowable; the perception of influence is undeniable.") Ohio voters imposed *Romer* type inequality (making LGBT persons strangers to the law) through Issue 1.

2. Avoiding Judicial Intrusion Upon a Historically Legislative Function. Ohio Resp to Cert. Pet. at 1. Although the Legislature passed Ohio's Super DOMA in 2004, OCPM and CCV embedded the issue into the Ohio Constitution. They and others raised fears that Ohio's judges would blindly follow Massachusetts judicial decisions.[30] Ohio

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[29] *Henry* 14-CV-0129 ECF 17-3 Pg ID 300-01, 310 (Becker at ¶¶84, 87-89 & Exhs J, M).

[30] Ohio's Super-DOMA's legislative history shows Ohio Courts consistently found Ohio statutory law barred same-sex marriage.

judges – in their symbiotic relationship with the Legislature – determine the constitutionality of many Ohio laws (e.g., tort reform) as a part of separation of powers. Fear of judges is not legitimate since Publius did not fear them.[31]

3. Maintaining Marriage Uniformity Throughout Ohio. The State states it is unfair to allow wealthier same-sex couples to marry outside Ohio while poorer ones can't afford to travel outside Ohio. Sixth Cir. Hodges Brf at 49. However touching the State's professed concern for poorer LGBT same-sex couples, wealthier opposite sex couples may marry outside Ohio and have their marriages recognized under the place of celebration rule.

4. Caution - Ohioans might have been motivated by the desire not to change the definition without taking steps to consider religious liberty issues and myriad state laws and regulatory systems. Sixth Cir. Hodges Brf at 46-48. This explanation defies the historical record. Ohio's same-sex marriage bans were fast-tracked through the Ohio's Legislature in 2004 and despite those, they became state constitutional bans through Ohio's 2004 ballot initiative in the 2004 Presidential election. Ohio is pandering to certain religious viewpoints within certain denominations. Although the First Amendment entitles CCV and certain religious

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[31] *The Federalist*, No. 78 (A. Hamilton), at 464-472 (Clinton Rossitor ed. 1961)("the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.")

organizations to express their views, they may not impose their religious/moral views on the legal and secular issue of marriage recognition. *Palmore, supra.* What about the rights of those who attend inclusive churches that would sanctify a same-sex marriage? The First Amendment religion clauses require governmental neutrality because civil marriage licensure and recognition is secular:

> [Some] simply believe that the state has the right to adopt a particular religious or traditional view of marriage regardless of how it may affect gay and lesbian persons. As this Court has respectfully explained, in America even sincere and long-held religious views do not trump the constitutional rights of those who happen to have been out-voted.

*Love v. Beshear*, 989 F.Supp.2d 536, 549 (WD Ky 2014).[32]

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[32]Two generations ago, Judge John Parker wrote for a unanimous three judge panel:

> The tyranny of majorities over the rights of individuals or helpless minorities has always been recognized as one of the great dangers of popular government. The fathers sought to guard against this danger by writing into the Constitution a bill of rights guaranteeing to every individual certain fundamental liberties, of which they might not be deprived by any exercise whatever of governmental power. This bill of rights is not a mere guide for the exercise of legislative discretion.

*Barnette v. West Virginia State Bd. of Ed.*, 47 F.Supp. 251, 254 (S.D.W.Va. 1942), aff'd sub *nom West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

## IV. An Individual's Fundamental Right To Marry And Establish One's Legal Relatives, Family, and Manage One's Intimate Relations Is Protected From Arbitrary Governmental Intrusion; Laws Voiding Licensed Out of State Marriages and Banning In-State Same-Sex Marriages Receive Heightened Scrutiny.

Prior to 2004, Ohio consistently followed the place of celebration rule and recognized legal marriages performed outside of Ohio, whether they be first cousins or underage. But with same-sex marriage, Ohio enacted marriage nullification:

> When a state *effectively terminates* the marriage of a same-sex couple married in another jurisdiction, it *intrudes* into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court.

*Obergefell*, 962 F.Supp.2d. at 979

From 1803-1991, Ohio, like many states, recognized common law marriages – entered into in Ohio or outside the state. Common law marriages do not entail a marriage license or certificate. These licensure laws (imposing ceremonial and registration requirements) have been strictly construed so as not to destroy common law marriages and bastardize children. *Meister v. Moore*, 96 U.S. 76 (1877)(Michigan licensing law construed to permit proof of earlier common law marriage). Although Ohio stopped recognizing <u>new</u> common law marriages entered into post 1991, it grandfathered

pre-1991 common law marriages. Ohio Rev. Code §3105.12. Since Ohio recognizes unlicensed common law marriages as legal marriages, and marriage is a fundamental right, there is no justification for voiding in state, same-sex marriages, and not recognizing out of state, licensed same-sex marriages. Ohio's marriage bans – which disparage, injure, and disrespect same-sex unions –warrant at least, careful consideration. *Windsor,* 113 S.Ct., at 2693, 2696.

This Court's precedents have applied a meaningful form of scrutiny to substantial burdens on the fundamental right to marry and struck them down. *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967)(Virginia ban on any interracial marriages, even those celebrated out of state); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (Wisconsin law barring non-custodial parent delinquent in child support from remarrying without court order); *Turner v. Safley*, 482 U.S. 78 (1987)(Missouri prison regulation prohibiting felons from marrying without superintendent's approval.)

*Zablocki's* class members could not remarry without a court order if they were non-custodial parents who owed back child-support. Applying a heightened standard of review, this Court rejected Wisconsin's barriers to Redhail's fundamental right to re-marry[33] *Zablocki*, 434 U.S. at 386-391.[34]

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[33] Because Wisconsin criminalized fornication, Redhail's only option for legal consortium was a licensed marriage. *Zablocki*, 434 U.S. at 386 fn.11.

In *Turner*, this Court recognized that the fundamental right to marry survives even in the prison context. The Court rejected a traditional or purely conjugal view of marriage. It recognized that marriage provides emotional support and public commitment, the free exercise of religious faith, an expectation of marital consortium, public benefits, status, and the intangible quality of respect. *Turner*, 482 U.S. 78, 95-96.

Justice Alito characterized marriage in *Windsor* as falling under either a traditional or conjugal view, and a consent-based vision of mutual love. *Windsor*, 133 S.Ct. at 2718-19 (Alito, J., dissenting). Other jurists have described traditional marriage as an institution that imposed gender inequality (coverture laws subsuming women's legal and property rights into those of her husband; women were deemed the sexual objects of their spouses). *Latta v. Otter*, 771 F.3d 456,487-490 (9th Cir. 2014)(Berzon, J., concurring).

Whatever one's view of consent-based marriage or conjugal marriage, one proposition remains clear: at bedrock, licensed civil law marriage (including common law marriage) means individuals become legal relatives – and not legal strangers in a

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[34] Writing pre-*Zablocki*, Professor Foster discussed paramour acts barring remarriage of at-fault spouses for certain periods of time, and economic barriers to remarriage such as Wisconsin's deadbeat parent law. Under *Zablocki* and *Turner*, these laws do not pass constitutional muster. Henry H. Foster Jr., *A 'Basic Civil Right of Man*,' 37 Fordham Law R. 51, 66-70 (1968).

household. The spouses have a legal status and need a court order to dissolve it. Every state's domestic relations law (marriage, divorce, and adoption) embodies this concept. So does federal immigration law. See 8 U.S.C. § 1151(b)(2)[post-*Windsor*, federal immigration law applies the place of celebration rule for legal marriages and treats legally married spouses (even same-sex) as immediate relatives.]

Ohio deviates from this bedrock concept and treats same-sex couples who marry as legal strangers, not as legal relatives. Ohio Rev. Code §§ 3101.01(C)(2)-(3). In 2007, the Ohio Supreme Court upheld the constitutionality of Ohio's domestic violence statute [Ohio Rev. Code § 2919.25] despite its tension with Ohio's same-sex marriage ban [Ohio Const. art. XV, § 11]. Justice Lanzinger observed:

> As noted in Judge Karpinski's dissenting opinion,[35]. . "[w]hen two unmarried people share financial responsibilities and engage in consortium with one another, what else have we done historically as a society other than to recognize that relationship as one that possesses the 'design, qualities, significance or effect of marriage.'"

*State v. Carswell*, 871 N.E.2d 547, 555 (2007)(Lanzinger, J., dissenting).

An *individual's* fundamental right to marry is part of an individual's right of familial association. Because these rights promote familial stability, this

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[35] *State v. Douglas*, Cuyahoga App. Nos. 86567 and 86568, 2006 WL 1304860

Court reviews these laws more rigorously. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) involved a municipal ordinance that criminalized a grandmother living with her two biological grandchildren. No important or compelling reason justified such invasive laws. The *Moore* merit Brief elegantly framed the argument:

> The principles of freedom of association coalesce around the common denominators of the family home and the composition of the family. The concepts are inseparable. The establishment of a family home is in itself a decision about who will share that home. These are matters of intensely personal choice and matters which society has historically considered to be beyond the province of legitimate governmental intrusion * * * *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).
>
> 1976 WL 178722 (1976), at p. 15.

Petitioners seek evidence and recognition of their marital status through legal (not religious) documents: accurate birth, marriage and death certificates listing them, as the case may be, as spouses or parents. Other than a dislike of same-sex couples or a desire to keep these couples hidden away in the closet, Ohio fails to provide any legitimate reasons justifying this major intrusion into marriage and family relations.[36] Nor has Ohio

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[36] *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 265 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 271 (2014); *Bostic v.*

explained why Ohio law must stigmatize the innocent children of these couples and destabilize these families.[37]

## V. The Intangible Aspects of Marriage – R-E-S-P-E-C-T – Find Out What It Means To Me.[38]

This case involves access to the legal status of marriage through an affirmative right to marry and a right to carry one's marital status across a state line and have it recognized. Although States restrict access through licensure laws, there is no shortage of marriage licenses. Licensure avoids the evidentiary problem of common law marriage and assists the vital statistics function. Marriage licenses are not rationed to keep unqualified individuals from exercising the right to marry or protect the public against unfit spouses.[39] The deadbeat parents in *Zablocki* and prisoners in *Turner* illustrate that although a government or democratic process may not view these individuals as optimal candidates for marriage, some form of heightened scrutiny should apply to substantial encroachments on a fundamental right. As recognized by *Lawrence's* dissenters, "principle and logic" would require the

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Continued. . . .

*Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert denied*, 135 S.Ct. 308 (2014).

[37] *Baskin v. Bogan*, 766 F.3d 648,663-664 (7th Cir. 2014), *cert. denied*, 135 S.Ct. 316 (2014); *Latta v. Otter*, 771 F.3d 456, 473 (9th Cir. 2014).

[38] Aretha Franklin, "R-E-S-P-E-C-T," (1967).

[39] Driver's licenses protect the public from unqualified drivers; professional licenses try to eliminate unqualified professionals.

Court to hold there is a constitutional right to same-sex marriage. 539 U.S., 558, 605 (Scalia, J., dissenting). *Loving* broke down the interracial marriage taboo. Similarly, same-sex marriage bans are the last taboos to equality for same-sex couples. This Court began the process in *Romer* and *Lawrence*. LGBT persons are indeed capable of having stable, committed relationships and raising families like everyone else. *Deboer v. Snyder*, 973 F.Supp2d. 757, 763-764 (E.D. Mich. 2014).

As to Wisconsin's and Indiana's same-sex marriage bans, Judge Posner cogently wrote:

> The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community. Not that allowing same-sex marriage will change in the short run the negative views that many Americans hold of same-sex marriage. But it will enhance the status of these marriages in the eyes of other

> Americans, and in the long run it may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples.
>
> *Baskin v. Bogan*, 766 F.3d at 658.

One sees the striking parallels to *Sweatt v. Painter* 339 U.S. 629, 634 (1950), where a law student sought access to the intangible qualities of attending a respected law school, instead of the inferior, ad hoc law school established solely to keep him isolated from fellow law students and the mainstream legal community. When it comes to marriage licensing/recognition, Ohio offers same-sex couples nothing. Just a complete ban – cradle to grave – fossilized in Ohio's Constitution after Issue 1's Official Explanation branded same-sex marriages as "deviant relationships," (J.A. 170) polygamous, months after the Ohio Legislature banned any kind of legal recognition for same-sex relationships.

The freedom to marry includes the freedom to marry the person of one's choice. Mildred Jeter, an African American woman, married Richard Loving, a white man, in the District of Columbia in 1958 because Virginia's miscegenation law would not let them get married. After an early morning raid of their home, the Lovings were indicted for unlawful co-habitation and given a suspended one year jail sentence if they departed Virginia for 25 years. They were effectively banished from their community and

unable to visit their families together.[40] Forty years later, Mildred Loving reflected on their ordeal:

> My generation was bitterly divided over something that should have been so clear and right. The majority believed what the judge said, that it was God's plan to keep people apart . . . . [N]ot a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry.[41]

Being legally able to say, I do, in front of one's own community and neighbors, is an intangible

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[40] *Loving*, 388 U.S. at 1, 3, 10-12; Phyl Newbeck, *Virginia Wasn't Always For Lovers* (2004). Shortly after *Loving*, Father (and Dean) Robert Drinan wrote: "The freedom to marry cannot in modern society be successfully separated from the freedom to marry the person of one's choice." Robert Drinan, *The Loving Decision and the Freedom to Marry*, 29 Ohio St. L.J. 358, 364-65 (1968). His observations remain correct.

[41] See Gregory Johnson, *We've Heard This Before: The Legacy of Interracial Marriage Bans And the Implications for Today's Marriage Equality Debates*, 34 Vermont L. Rev. 277, 288-89 & n. 56 (2009) [quoting Mildred Loving, Statement Prepared for the 40th Anniversary of the *Loving v. Virginia* Announcement: Loving for All 2 (June 12, 2007), available http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf.]

aspect of legal marriage.[42] Being able to remain married and deemed married in one's own state – and not have a legal cloud cast upon one's marriage – is an intangible aspect of marriage. Marriage stabilizes relationships and families.

Finally, people of good will understand what R-E-S-P-E-C-T means to persons who are LGBT. To those who are just learning – as Judge Posner observed -- legal same-sex marriage will help them get there. The overarching theme of *Windsor* is just that.[43]

## VI. Because We're Goin To The Chapel and We're Gonna Get Married. Gee I Really Love You and We're Gonna Get Married[44]

The petitioners are not mere "abstractions" who stumbled into federal court, but real human beings who seek to vindicate their 14th Amendment rights. *Deboer v. Snyder*, 772 F.3d. 388, 421 (6th Cir. 2014)(Daughtrey, J., dissenting). As Judge Posner put it, "minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671. Marriage non-recognition and the denial of licensing

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[42] *Windsor*, 133 S.Ct. at 2689 (". . same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community")

[43] Brf. Appellees *Campaign for Southern Equality v. Bryant*, No.14-60837, p.22, 37 (5th Cir.) and Jan. 9, 2015 oral argument of Roberta Kaplan

[44] "Chapel of Love," Phil Spector, Ellie Greenwich, Jeff Barry (1964) famously recorded by the Dixie Cups.

deeply wounds the Chorus' membership. Ohio law allows them to have unhappy heterosexual marriages but they may not marry the persons they love in their own communities. Neither could Romeo and Juliet.

Chorus Couple 1:

> My husband and I met when he joined the North Coast Men's Chorus. He and I both come from traditional large families. . . We were both raised Catholic and both had been married in the past. He raised 4 daughters with his ex-wife and I raised a daughter and two sons with my ex-wife. Although it is certainly done quite often now, neither of us could have imagined trying to raise our children and fit into this society without the benefit of marriage.
>
> Although not everyone our age (58 & 60) is so blessed, we both know and feel the support of our friends and families. . . On July 3, 2009, we had nearly 120 people (family and friends) there to support us in our commitment ceremony on our backyard patio. With seven grown children and nine grand-boys between us it would be nice to have the security of the legal protections that marriage provides. This past St. Patrick's Day we were legally married in Palm Springs, California in front of four of our friends and celebrated on Facebook.

Chorus Couple 2:

I am 53 years old and my husband is 54 years old and we have been together for 33 years. We legally married on July 28th, 2011 in Provincetown, Massachusetts. It would have been nice to legally marry in Ohio, where we have both lived since birth and call our home.

We can now say we are married legally, but still not in Ohio. Marriage equality is now recognized federally, but still not in Ohio. In Massachusetts if one of us were to become ill and require the other to make decisions for us, it would be legal, but still not in Ohio. In Massachusetts if one of us were to die, the other as a legal spouse would have protections under the state's law, but still not in Ohio. * * * It is hard to fathom how in this great country of ours, one can be accepted in another state, but legally discriminated against in their own home state. We can only hope that one day, in our lifetime our love can be recognized at home!

Chorus Couple 3:

We have two marriage anniversaries; the day we made our vows in our church, Pilgrim Congregational United Church of Christ in Cleveland, OH (June 2005) and the day we made our solemn pledge to each other and signed our legal marriage

> license in Claremont, CA (October 2008). We would have preferred to have only one anniversary which would be that day in Ohio when first made promises to each other before God, family and friends. It is from that day forward that we have considered ourselves to be married. Having another anniversary date, points to the inequality and discrimination that exists in Ohio law.
>
> Neither the church nor the state marries anyone. People marry each other. . . The state decides which couples it will give a marriage license. Religious bodies decide which couples they will recognize and bless with their rituals of marriage. * * * And is not each religious body free to set its own standard, with no one religious body being allowed to establish a particular religious standard on the whole?

## VII. Conclusion

As Tony and Maria sang about their forbidden love in *West Side Story*:

> Make of our hands, one hand,
> Make of our hearts, one heart.
> Make of our vows, one last vow;
> Only death will part us now.
> Make of our lives, one life.
> Day after day, one life.
> Now it begins, Now we start;

One Hand, One Heart.
Even death won't part us now.[45]

All four district court judges in this consolidated appeal ruled that the Fourteenth Amendment mandated that the Petitioning LGBT couples could make their hands - one hand, their hearts - one heart, and their vows, one last vow. This Court should do the same.

The judgment below should be reversed.

Respectfully Submitted,

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[45]"One Hand, One Heart," *West Side Story* (1957). Music by Leonard Bernstein, Lyrics by Stephen Sondheim, Conception of Jerome Robbins, Book by Arthur Laurents, see http://www.westsidestory.com/site/level2/lyrics/one.html.